

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

REAL VIEW, LLC

Plaintiff,

v.

20-20 TECHNOLOGIES, INC.,

Defendant.

CIVIL ACTION NO. 07-12157

20-20 TECHNOLOGIES, INC.,

Counterclaim Plaintiff

v.

REAL VIEW, LLC

Counterclaim Defendant, and

BORIS ZELDIN and LEONID PERLOV

Additional Party Defendants
in Counterclaim

20-20'S PROPOSED ADDITIONAL JURY INSTRUCTIONS

20-20 Technologies, Inc. requests the following additional jury instructions in this matter.

Missing Witness:

If you find that a witness who could give material testimony on an issue in this case and who is either favorably disposed to testify for one party or is peculiarly within the power of one party to call, you may infer from that party's failure to call him that his testimony would be unfavorable to that party.¹ However, you may not make such an inference if the witness's testimony would be merely cumulative of testimony already given by another witness.²

¹ See *Grajales-Romero v. American Airlines, Inc.*, 194 F.3d 288, 298 (1st Cir. 1999); *Steinhilber v. McCarthy*, 26 F. Supp. 2d 265, 281 (D. Mass 1998).

² See *Steinhilber v. McCarthy*, 26 F. Supp. 2d at 281.

Download:

Finally, as you heard, Real View has stipulated that it illegally downloaded a copy of 20-20 Design version 6.1 without permission of 20-20, and this is a copyright infringement. You must consider the types of use that were made and whether such use would have been allowed under a license, and the value of such use.³ However, the infringer cannot expect to pay in damages the same license fee as it might have paid after freely negotiated bargaining, or there would be no reason scrupulously to obey the copyright laws.⁴

³ See *Steven Greenberg Photography v. Matt Garrett's of Brockton, Inc.*, 816 F. Supp. 46, 49 (D. Mass. 1992).

⁴ *Bruce v. Weekly World News, Inc.*, 310 F.3d 25, 29 (1st Cir. 2002) (quoting *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 475 F. Supp. 78, 83 (S.D.N.Y. 1979), aff'd, 621 F.2d 57 (2d Cir. 1980)); *Joe Hand Promotions, Inc. v. Salinetti*, 148 F. Supp. 2d 119, 120 (D. Mass. 2001); see also *Deltak, Inc. v. Advanced Systems, Inc.*, 767 F.2d 357, 363 (7th Cir. 1985).

Damages:

If you find that Real View infringed 20-20 Design version 6.1 or 6.4, you may award 20-20 any actual damages that were caused by Real View's infringement.⁵ These actual damages may include damages to the value of subsequent versions of 20-20 Design derived from versions 6.1 or 6.4, including 8.1 even if the subsequent versions were not infringed.⁶

⁵ 17 U.S.C. § 504(a).

⁶ *Montgomery v. Noga*, 168 F.3d 1282, 1294-95 (11th Cir. 1999) (where the defendant infringed plaintiff's copyright in its software version 2.9a, jury could properly consider evidence of injury to the value of subsequent versions derived from version 2.9a to determine the extent of the injury to the registered version) (citing *4 Nimmer on Copyright* § 14.02[A] "the injury to the market value of the copyrighted work includes any injury to the value of 'sequel rights'"); see also *Abend v. MCA, Inc.*, 863 F.3d 1465 (9th Cir. 1988) ("Any impairment of Abend's ability to produce new derivative works based on the story would be reflected in the calculation of the damage to the fair market value of the story.").

Dated: January 31, 2011

Respectfully submitted,

/s/ Timothy C. Blank
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Certificate of Service

I hereby certify that on January 31, 2011, a true and correct copy of the foregoing document was served upon opposing counsel by hand delivery and ECF filing.

/s/ Timothy C. Blank